No. 47123-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

BRIAN KEITH HARPER,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 14-1-02115-3
The Honorable Stephanie Arend, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Brian Harper's CrR 3.6 motion to suppress.

2. The State failed to show by clear and convincing evidence that the challenged Terry stop was justified.

3. The arresting police officers failed to articulate sufficient facts to establish a reasonable suspicion of criminal behavior that justified a Terry stop of the vehicle.

4. The trial court erred in finding that Brian Harper had the present or future ability to pay discretionary legal financial obligations.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did law enforcement officers fail to articulate sufficient facts to establish a reasonable suspicion of criminal behavior that justified a Terry stop of the vehicle, where the vehicle resembled witnesses' descriptions of a vehicle possibly involved in a recent drive-by shooting and where the race of the occupants matched witness descriptions, but where law enforcement noted no additional behavior that was criminal or a violation of traffic laws or even remotely suspicious, and where the vehicle was driving in a busy area adjacent to the

Tacoma Mall and Interstate 5 that is 17 blocks away from the scene of the drive-by shooting? (Assignments of Error 1, 2, 3)

2. Did the trial court fail to comply with RCW 10.01.160(3) when it imposed discretionary legal financial obligations as part of Brian Harper's sentence, where there was no evidence that he has the present or future ability to pay? (Assignment of Error 4)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Brian Keith Harper with one count of unlawful possession of a firearm (RCW 9.41.040). (CP 1) The trial court denied Harper's pretrial motion to suppress, and admitted custodial statements Harper made to arresting officers. (2RP 112, 128; CP 6-9, 133-36)[1] A jury convicted Harper as charged. (3RP 331; CP 131) The trial court denied Harper's request for a downward departure from the standard range, and sentenced Harper to 31 months of confinement. (01/09/15 RP 6-8, 11-13; CP 138-45; 154) This appeal timely follows. (CP 160)

[1] The transcripts labeled volumes 1, 2 and 3 will be referred to by their volume number (#RP). The remaining transcripts will be referred to by the date of the proceeding contained therein.

B. SUBSTANTIVE FACTS

1. *Facts from CrR 3.6 & CrR 3.5 Hearing*

In the early evening of May 30, 2014, Tacoma 911 dispatch received multiple calls reporting a drive-by shooting at the corner of South Oakes Street and South 54th Street. (1RP 11, 34; CP 28, 35) Callers reported that a white Ford Crown Victoria or a white Chevrolet Caprice, occupied by two black males, had fired at two pedestrians. (1RP 12-13, 34-35; CP 28, 35, 133) Witnesses reported that the vehicle had driven eastbound towards Tacoma Mall Boulevard. (1RP 35; CP 35)

A few minutes later, Tacoma Police Officers Chris Yglesias and Joshua White saw a white Crown Victoria, occupied by two black males, approaching the intersection of South 48th Street and Tacoma Mall Boulevard.[2] (CP 35, 133; 1RP 35) The vehicle was not observed violating any traffic laws, and the occupants were not observed engaging in any suspicious or criminal conduct. (1RP 45-46) Nevertheless, Officers Yglesias and White conducted a "high-risk" traffic stop by removing the Crown Victoria's occupants at gun-point and placing them handcuffed into patrol vehicles. (1RP 13,

[2] This intersection is 17 blocks or, according to Google Maps, about 1 mile from the reported drive-by location. (1RP 35)

36-37; CP 35, 134)

The driver was identified as Rodney Williams-Sanders and the passenger was identified as Brian Harper. (1RP 14, 36-37; CP 35, 134) Officers noticed a firearm in plain view on the floorboard of the front passenger side of the car. (1RP 16; CP 35, 134) When questioned about the firearm, Harper told the Officers that it belonged to him. (1RP 18; CP 134)

2. *Facts from Trial*

The evidence presented at trial was essentially consistent with the evidence presented at the suppression hearing. A firearms expert testified that the gun found under the passenger seat was operational and capable of being fired. (2RP 258) Harper also stipulated that he has a prior conviction that makes him ineligible to possess a firearm. (3RP 274)

IV. ARGUMENT & AUTHORITIES

A. HARPER'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED BECAUSE THE STATE FAILED TO PRESENT SUFFICIENT FACTS TO ESTABLISH A REASONABLE SUSPICION OF CRIMINAL BEHAVIOR THAT JUSTIFIED A TERRY STOP.

Generally, a warrantless search is unreasonable under both our Federal and State constitutions, unless the search falls within one or more specific exceptions to the warrant requirement. U.S.

Const. Amd. IV; Wash. Const. art. I, § 7; State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). The State has the burden of proving that a warrant exception applies. State v. Vrieling, 144 Wn.2d 489, 492, 28 P.3d 762 (2001); State v. Ladson, 138 Wn.2d 343, 349–50, 979 P.2d 833 (1999). One exception to the warrant requirement is that an officer may briefly detain a vehicle's driver for investigation if the circumstances satisfy the "reasonable suspicion" standard under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). *See* State v. Mendez, 137 Wn.2d 208, 220, 970 P.2d 722 (1999).

The State must show by clear and convincing evidence that the Terry stop was justified. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). A Terry stop requires a well-founded suspicion that the defendant has engaged in criminal conduct. Terry, 392 U.S. at 21; Garvin, 166 Wn.2d at 250. "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21.

"The circumstances must suggest a substantial possibility that the particular person has committed a specific crime or is about

to do so." State v. Martinez, 135 Wn. App. 174, 180, 143 P.3d 855 (2006) (citing State v. Garcia, 125 Wn.2d 239, 242, 883 P.2d 1369 (1994)). But an important safeguard to individual liberty in a Terry stop analysis is the principle that the circumstances justifying a Terry stop must be more consistent with criminal conduct than with innocent conduct. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992); State v. Thierry, 60 Wn. App. 445, 448, 803 P.2d 844 (1991).

For example, "[a] person's presence in a high-crime area at a 'late hour' does not, by itself, give rise to a reasonable suspicion to detain that person." State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010) (citing State v. Ellwood, 52 Wn. App. 70, 74, 757 P.2d 547 (1988)). "Similarly, a person's 'mere proximity to others independently suspected of criminal activity does not justify the stop.'" Doughty, 170 Wn.2d at 62 (quoting State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980)). And "a hunch alone" does not warrant police intrusion into people's everyday lives. Doughty, 170 Wn.2d at 63.

In Doughty, the defendant was stopped "for the suspicion of drug activity" and subsequently arrested for driving with a suspended license. 170 Wn.2d at 60. Doughty challenged his

seizure and arrest at trial. 170 Wn.2d at 61. The facts relied upon by the State to support Doughty's seizure included: (1) that Doughty was seen leaving a house that law enforcement had identified as a drug house; (2) there had been recent complaints from neighbors; (3) Doughty visited the house at 3:20 a.m.; and (4) his visit lasted less than two minutes. 170 Wn.2d at 62. Doughty's challenge to this seizure was rejected by the trial court, but on appeal the Supreme Court reversed, stating:

> These facts fall short of the reasonable and articulable suspicion required to justify an investigative seizure under both the Fourth Amendment and article I, section 7. Police may not seize a person who visits a location—even a suspected drug house—merely because the person was there at 3:20 a.m. for only two minutes.
>
> The Terry–stop threshold was created to stop police from this very brand of interference with people's everyday lives.

170 Wn.2d at 62-63.

Other cases where vehicle stops conducted on suspicion of criminal activity were affirmed are distinguishable from the current case. For example, in State v. Moreno, 173 Wn. App. 479, 484, 493, 294 P.3d 812 (2013), police received multiple reports of gunfire in an area claimed as "turf" by the Sureño gang. Sureño's are known to wear the color blue. A few moments later, about one

block away from where the gunfire had been reported, a Yakima Police Sergeant saw a car leaving an alley faster than usual given the poor state of the alleyway. The Sergeant was struck by the fact that one of the passengers was wearing a red shirt. Red is the color claimed by a rival gang, the Norteños, and the Sergeant knew that people did not usually wear red in a Sureño neighborhood. Moreno, 173 Wn. App. at 484-85, 493.

Based on the nature of the neighborhood, the proximity to the crime, the speed of the car, the late hour, the type of crime reported, and the red shirt, the Sergeant thought that "this car is somehow involved or . . . they can tell me more about what's happened." Moreno, 173 Wn. App. at 484-85. The Sergeant stopped the car and detained its occupants. 173 Wn. App. at 484. After further investigation, a search warrant was obtained and the car searched. 173 Wn. App. at 487. Police found several firearms and other incriminating evidence in the trunk of the car. 173 Wn. App. at 487.

The State charged Moreno with first degree assault and unlawful possession of a firearm. Moreno moved to suppress all of the evidence found in the trunk, arguing that the stop was based on "nothing more than a hunch." Moreno, 173 Wn. App. at 491. The

trial court denied the motion and Division Three affirmed, finding that "[g]iven all", it was reasonable to stop the car. 173 Wn. App. at 487.

In Thierry, Pierce Transit security officers observed Thierry and a passenger driving slowly past the 10th and Commerce transit stop in downtown Tacoma, which is a high crime area with a high incidence of gang activity, drug traffic, and violence. 60 Wn. App. at 446-47. Despite the forty-degree weather, Thierry had the windows rolled down, and his radio was playing loud enough to draw the attention of people in the area. 60 Wn. App. at 447. Thierry and the passenger were both slouched down in the front seat of the car. Thierry drove into a parking lot on Commerce adjacent to the transit area, made no attempt to park, and then stopped instead of exiting when he arrived back at the entrance. 60 Wn. App. at 447.

Because this activity fit the Tacoma Police Department's profile of drive-by shootings, the officers approached the car. Thierry, 60 Wn. App. at 447. As they came closer, Thierry immediately turned down his radio, and one of the officers saw a two-foot-long wooden bat on the floor of the car at Thierry's feet. He also noticed that the passenger was making furtive hand

motions. As an officer walked to the driver's side of the car, he immediately saw a cocked semiautomatic pistol between the front armrests. During a subsequent search of the car the officers found an additional gun and weapons. 60 Wn. App. at 447.

Thierry's motion to suppress was denied, and he was convicted of carrying a loaded pistol without a license. Thierry, 60 Wn. App. at 446-47. On appeal, this Court rejected his argument that the initial stop made by the officers was invalid, because "the officers, working a high crime area, observed behavior consistent with the profile of drive-by shootings." But the court also noted: "Even if Thierry's behavior might arguably be viewed as innocent, the ultimate test for reasonableness of an investigative stop involves weighing the invasion of personal liberty against the public interest to be advanced. . . . The officers' intrusion in this case was negligible, and their seizure of the pistol and additional weapons was valid." Thierry, 60 Wn. App. at 449.

In this case, the trial court concluded that the stop was justified based on the following:

> Based on the testimony presented during the 3.6 hearing, Tacoma Police Officers involved in this case conducted a permissible Terry stop of Harper while investigating a drive-by shooting/assault incident because he was riding in a vehicle that had been

> described as being involved in the drive-by; the vehicle, within minutes, was located a mile from the scene of the shooting; and he fit the description of suspect[s] described by 911 callers.

(CP 135) The trial court was incorrect because these circumstances do not justify a Terry stop.[3] Simply being within driving distance of reported criminal activity, and in a similar car and of the same race as the suspects, does not create a well-founded suspicion that Harper or Williams-Sanders engaged in criminal conduct. Terry, 392 U.S. at 21; Garvin, 166 Wn.2d at 250.

Unlike in Moreno and Thierry, there was nothing in the behavior of Harper or Williams-Sanders that would suggest that they were involved in a criminal act that had taken place a mile away. They were in a similar car and were also black males. But driving a white car and being a black male is not sufficiently indicative of criminal activity and does not justify being stopped at gunpoint, handcuffed, and placed in a police cruiser.

In Moreno, the car sped out of an alley one block away from a just-reported shooting and an occupant was wearing rival gang colors. In this case, the Crown Victoria was a mile away from the

[3] When reviewing the denial of a motion to suppress, the trial court's conclusions of law are reviewed *de novo*. Mendez, 137 Wn.2d at 214 (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

reported shooting, was not observed speeding or driving erratically, and the occupants were not observed making suspicious or furtive movements. In Thierry the windows were rolled down despite very cold weather, the driver and passenger were slouched down so their bodies were concealed from view, and they drove slowly around a parking lot in an area known for gang violence, actions understood by police to be consistent with gang shootings. In this case, the Crown Victoria was simply driving on the street a mile from the scene.

Unlike in Moreno and Thierry, the Crown Victoria was not stopped because of any facts specifically related to the occupants' behavior, but only because they were driving a similar car in the direction that the drive-by shooting suspects could have also driven. This is the "very brand of interference with people's everyday lives" that the Terry stop threshold was created to prevent. Doughty, 170 Wn.2d at 63.

Furthermore, unlike in Thierry, where the officers simply approached Thierry's already stationary car and observed weapons in plain view, the initial stop in this case was highly intrusive. Officers White and Yglesias followed and then stopped the Crown Victoria even though its driver had not committed any immediate

traffic infraction, and ordered Harper and Williams-Sanders out of the vehicle at gunpoint, handcuffed them, and placed them in police cruisers. (1RP 22, 36-37, 45-46; CP 35, 134)

The initial stop, and everything that followed, was improper.[4] If the initial stop was unlawful, any subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (citing Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963); State v. Larson, 93 Wn.2d 638, 611 P.2d 771 (1980)). The trial court erred when it denied Harper's motion to suppress, and Harper's conviction must be reversed.

B. THE RECORD FAILS TO ESTABLISH THAT THE TRIAL COURT ACTUALLY TOOK INTO ACCOUNT HARPER'S FINANCIAL CIRCUMSTANCES BEFORE IMPOSING DISCRETIONARY LFOS.

The trial court ordered Harper to pay legal costs in the amount of $2,000.00, which included discretionary costs of $1,200.00 for appointed counsel and defense costs. (01/09/15 RP 13; CP 152)

The Judgment and Sentence includes the following

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[4] Harper may object to any search of Williams-Sanders' vehicle because automatic standing applies when a passenger is charged with a possessory offense. See State v. Jones, 146 Wn.2d 328, 332-33, 45 P.3d 1062 (2002); State v. Coss, 87 Wn. App. 891, 895-96, 943 P.2d 1126 (1997).

boilerplate language:

> 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

(CP 151) But there was no discussion on the record regarding Harper's ability to pay.

RCW 10.01.160 gives a sentencing court authority to impose legal financial obligations on a convicted offender, and includes the following provision:

> [t]he court **shall not** order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court **shall** take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160 (3) (emphasis added). The word "shall" means the requirement is mandatory. State v. Claypool, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002). The judge must consider the defendant's individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay, and the record must reflect this inquiry. State v. Blazina,

182 Wn.2d 827, 837-38, 344 P.3d 680 (2015). Hence, the trial court was without authority to impose LFOs as a condition of Harper's sentence if it did not first take into account his financial resources and the individual burdens of payment.

While formal findings supporting the trial court's decision to impose LFOs under RCW 10.01.160(3) are not required, the record must minimally establish the sentencing judge did in fact consider the defendant's individual financial circumstances and made an individualized determination that he has the ability, or likely future ability, to pay. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011). If the record does not show this occurred, the trial court's LFO order is not in compliance with RCW 10.01.160(3) and, thus, exceeds the trial court's authority.

Recently, in Blazina, our State Supreme Court decided to address a challenge to the trial court's imposition of LFOs, notwithstanding the defendant's failure to object below, because of "[n]ational and local cries for reform of broken LFO systems" and the overwhelming evidence that the current LFO system disproportionately and unfairly impacts indigent and poor offenders.

182 Wn.2d at 835.[5] The Blazina court also noted that "if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs." 182 Wn.2d at 839. Here, Harper was found indigent for both trial and on appeal. (CP 161-62, 165)

The record does not establish the trial court actually took into account Harper's financial resources and the nature of the payment burden or made an individualized determination regarding his ability to pay. And the trial court made no further inquiry into Harper's financial resources, debts, or future employability. Because the record fails to establish that the trial court individually assessed Harper's financial circumstances before imposing LFOs, the court did not comply with the authorizing statute. Consequently, this Court should vacate that portion of the Judgment and Sentence.

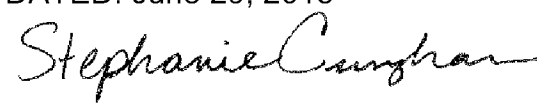
V. CONCLUSION

The Terry stop in this case was not based on articulable facts that reasonably warrant a well-founded suspicion that the

[5] The Blazina Court "exercise[d] its RAP 2.5(a) discretion" to reach the merits of the issue, despite the lack of objection at sentencing. 182 Wn.2d at 835. RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right. This Court may also reach the merits of this issue under RAP 2.5(a) despite Harper's failure to object to the imposition of discretionary costs below.

Crown Victoria or its occupants were involved in criminal activity. This error requires that Harper's conviction be reversed and that the evidence obtained as a result of the search be suppressed. Alternatively, Harper's case should be remanded so that the trial court can properly consider his ability to pay LFOs.

DATED: June 29, 2015



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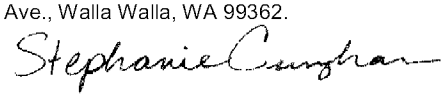

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